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No. 96-795

In the Supreme Court of the United States

OCTOBER TERM, 1996

ALLENTOWN MACK SALES AND SERVICE, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel
LINDA SHER
Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner committed an unfair labor practice by polling its employees about their continued support for their union when petitioner did not have a good-faith reasonable doubt as to the union's majority status.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 83 F.3d 1483. The decision and order of the National Labor Relations Board (Pet. App. 19-27) and the decision of the administrative law judge (Pet. App. 28-64) are reported at 316 N.L.R.B. 1199.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1996. A petition for rehearing was denied on September 13, 1996. Pet. App. 66-67. The petition for

a writ of certiorari was filed on November 19, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 5, 1990, petitioner purchased a truck sales and repair facility in Allentown, Pennsylvania, from Mack Trucks, Inc. Mack had previously recognized Local Lodge No. 724, International Association of Machinists, AFL-CIO (the Union) as the exclusive representative of a bargaining unit of service and parts department employees at the facility. Pet. App. 29, 30, 32. By January 1, 1991, petitioner hired into the bargaining unit 32 employees, all of whom had been employed by Mack on the date it ceased operations. *Id.* at 39-40.

On January 2, 1991, the Union requested petitioner to recognize it as the bargaining representative of the unit employees, and to commence negotiations for a contract covering those employees. Pet. App. 35. On January 25, 1991, petitioner rejected the Union's request. Petitioner asserted that "[t]here is a good faith doubt as to support of the Union among the employees hired by the Company," and informed the Union that, "[i]n order to avoid possible protracted and unproductive dispute over this issue," it would arrange for an "independent poll" of the employees in the bargaining unit by secret ballot on February 8. *Id.* at 43. At the poll, 13 employees cast ballots for representation by the Union, and 19 cast ballots against the Union. *Id.* at 44.

2. Acting on unfair labor practice charges filed by the Union, the General Counsel of the National Labor Relations Board (Board) issued a complaint against petitioner. Pet. App. 28. An administrative law judge

(ALJ) concluded that petitioner had committed an unfair labor practice by taking the poll and refusing to bargain with the Union, *id.* at 28-64, and the Board agreed, *id.* at 19-27.

a. The ALJ initially concluded that petitioner was a successor to Mack and was therefore presumptively obligated to recognize and bargain with the Union, which enjoyed a rebuttable presumption of continued majority status in the bargaining unit after petitioner commenced operations. Pet. App. 32 n.4, 38-42. The ALJ then observed that, under Board precedent, an employer may conduct a poll of its employees to test a union's continued support only if the employer has a "good-faith reasonable doubt, based upon objective considerations, of the continuing majority status of the [u]nion before conducting the poll." *Id.* at 45 (citing *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057 (1989), remanded as modified, 923 F.2d 398 (5th Cir. 1991)). That standard, the ALJ noted, is also the standard required by the Board "to justify withdrawal of recognition from an[] incumbent union." Pet. App. 45.

After examining petitioner's proffered evidence in support of its alleged good-faith reasonable doubt as to the Union's majority status, the ALJ found that, as of January 25, 1991, only six or seven of the 32 employees in the bargaining unit (approximately 20% of the unit) had clearly indicated that they no longer desired to be represented by the Union. Pet. App. 52. That evidence, the ALJ concluded, was insufficient to constitute "an objective reasonable doubt of union majority support," and therefore did not justify the poll conducted by petitioner. *Id.* at 52-53.

The ALJ also noted that the Fifth, Sixth, and Ninth Circuits apply a "somewhat lesser standard" in deter-

mining the legality of employer polls. Pet. App. 53 n.7. Under those courts' standard, an employer may conduct an employee poll to test continued union support if it has "substantial, objective evidence of loss of union support, even if that evidence is insufficient in itself to justify withdrawal of recognition." *Ibid.* The ALJ expressed "doubt" that petitioner's evidence of loss of support by only 20% of the employees in the bargaining unit would satisfy even the standard applied by those courts. *Ibid.*

b. With certain modifications not relevant here, the Board affirmed the ALJ's findings and conclusions. Pet. App. 19-27. The majority of the Board agreed with the ALJ that petitioner lacked a reasonable doubt of the Union's majority status when it conducted the poll, and that, under its *Texas Petrochemicals* decision, petitioner was therefore not entitled to take the poll. *Id.* at 25-26. The Board also noted (as had the ALJ) that some courts of appeals have endorsed a "more lenient standard for polling." *Id.* at 26 n.9. It found, however, that "the showing made by [petitioner] (6 or 7 employees opposed to the Union out of a bargaining unit of 32)" was "insufficient" to meet even those courts' polling standard. *Ibid.* Board Member Stephens agreed that petitioner's evidence did not satisfy even the more lenient standard for polling and would have affirmed the ALJ's findings on that basis. *Ibid.*

3. A divided panel of the court of appeals enforced the Board's order. Pet. App. 1-18. The panel upheld the Board's policy of permitting employer polling only if the employer has "objective indications sufficient to raise a reasonable doubt about the union's majority status"—which is the same standard that would permit an employer to withdraw recognition from a

union, or to petition for a Board-conducted election to test the continued support of the union (an "RM" election). *Id.* at 3. The court acknowledged that the Fifth, Sixth, and Ninth Circuits have rejected the Board's standard for polling, but it disagreed with the analysis of those courts. *Id.* at 4 & n.1, 8.

The court observed that, even if the other courts' "basic proposition" were correct—"that the standard for polling should be lower than the standard for withdrawal of recognition"—that would not necessarily lead to the conclusion that the Board's polling standard should be relaxed. The same objective, the court noted, could be accomplished "by raising the Board's withdrawal-of-recognition standard." Pet. App. 6. The court also noted that the other courts of appeals that have rejected the Board's polling standard have created a different anomaly, by "making it easier for an employer to conduct an unsupervised poll than to have a Board-supervised RM election." *Ibid.*

The court found this to be an area in which deference to the Board is appropriate, since "[n]othing in the National Labor Relations Act specifically governs [employer polling.]" Pet. App. 7. Recognizing the Board's concern that polling employees about their support for an incumbent union is "potentially, if not inherently, both disruptive of the collective-bargaining relationship . . . and also unsettling to the employees involved" (*ibid.* (quoting *Texas Petrochemicals*, 296 N.L.R.B. at 1061)), the court concluded that, "[i]n light of these dangers, the Board, in its expert judgment, reasonably limited the circumstances in which employers may conduct polls." Pet. App. 7.

Applying the Board's polling standard, the court agreed with the Board that petitioner failed to meet that standard in this case. Pet. App. 9-12. Thus, the court sustained, as supported by substantial evidence, the Board's finding that petitioner did not possess a reasonable doubt about the Union's majority status as of January 25, 1991 (the date on which it refused to recognize the Union and announced it would poll the employees) because petitioner had reason to believe that "only 7 of the 32 employees had repudiated the union" as of that date. *Id.* at 12; see *id.* at 9.

Judge Sentelle dissented. Pet. App. 13-18. He agreed with the reasoning of other courts of appeals that have disapproved the Board's polling standard—namely, that under that standard, "an employer cannot conduct a poll to determine majority support unless it already has so much evidence of no majority support as to render the poll meaningless." *Id.* at 15. He also suggested that the record demonstrated "overwhelming objective evidence of the loss of majority support" for the Union in the bargaining unit. *Id.* at 18.

ARGUMENT

The court of appeals correctly upheld the National Labor Relations Board's longstanding rule that an employer violates Section 8(a)(5) and (1) of the National Labor Relations Act (Act)[1] by conducting a poll

[1] Section 8(a)(5), 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of" Section 9(a) of the Act. Section 9(a), 29 U.S.C. 159(a), provides, in relevant part, that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit." Section 8(a)(1), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, among which is "the right * * * to bargain collectively through representatives of their own choosing." 29 U.S.C. 157.

of its employees about their continued support for their union unless, prior to the poll, the employer possesses a good-faith reasonable doubt, based on objective evidence, as to the union's continued majority status. That rule has been rejected by other courts of appeals. This case, however, is not an appropriate vehicle for this Court's resolution of the issue because petitioner's poll was unlawful even under the lower standard for polling articulated by the courts that have rejected the Board's rule. Moreover, the question whether the Board's polling standard represents a reasonable construction of the Act may soon become academic; in a case currently pending before the Board, the General Counsel has urged the Board to adopt new rules respecting the circumstances under which employers may withdraw recognition from, and poll employees represented by, certified unions. Accordingly, the Court's intervention is not warranted at this time.

1. a. As this Court has often explained, Congress gave the Board the "primary responsibility for developing and applying national labor policy." *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990); see, *e.g.*, *Auciello Iron Works, Inc.* v. *NLRB*, 116 S. Ct. 1754, 1759 (1996); *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500-501 (1978); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). When the Act does not speak directly to an issue, the Court accords

"considerable deference" to the Board's interpretation and will uphold that interpretation if it is "rational and consistent with the Act." *Curtin Matheson*, 494 U.S. at 786-787; *Auciello Iron Works*, 116 S. Ct. at 1759; *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987); see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under those well settled principles, the court of appeals correctly upheld the Board's polling standard in this case.

As the court of appeals recognized (Pet. App. 7), the Act does not specifically address the subject of employer polls. The Board has concluded, in an exercise of its authority to interpret the Act's provisions, that an employer violates Section 8(a)(5) and (1) of the Act by polling its employees unless, prior to conducting the poll, the employer possesses a good-faith reasonable doubt as to the union's majority status. That position is of long duration, see *Montgomery Ward & Co.*, 210 N.L.R.B. 717 (1974), and was recently reaffirmed by the Board after a reexamination of the matter, in light of the criticism of the policy expressed by some courts of appeals. *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057 (1989), remanded as modified, 923 F.2d 398 (5th Cir. 1991).

When it reconsidered and reaffirmed the polling standard, the Board undertook "[a] balancing of the various employer, employee, union, and statutory interests at stake." *Texas Petrochemicals*, 296 N.L.R.B. at 1062. The Board concluded that its "reasonable doubt" standard for polling is more consistent with the ultimate goal of the Act—stability in collective-bargaining relationships—than is the less stringent standard favored by the courts of appeals that had rejected the Board's rule. As the Board

explained, its standard "makes a poll neither easier nor more difficult to justify than a Board-conducted [RM] election." *Id.* at 1061. By contrast, the courts' less stringent standard—permitting a poll based on "substantial, objective evidence of loss of union support," even absent evidence of loss of majority status, see Pet. 11—"permits an employer to conduct a poll where the Board would not conduct an election and could thus lead employers to poll their employees about their support for an incumbent union where there is a reduced likelihood that the poll would establish an actual loss of majority support." 296 N.L.R.B. at 1061.

The Board's standard thus avoids the anomaly that would exist if a less stringent rule were adopted for polling, namely, that the standard for "an in-house, relatively informal poll" of employees would be less strict than that for a full-scale, formal Board-conducted RM election. See *Texas Petrochemicals*, 296 N.L.R.B. at 1060. A less stringent standard for polling would also increase the potential for disruption of collective-bargaining relationships. Polls, the Board has found, are "potentially, if not inherently, both disruptive of the collective-bargaining relationship between an employer and a union and also unsettling to the employees involved," for the very act of "[s]ubmitting a union's role as representative to an employer-initiated and conducted employee referendum raises * * * a doubt in the mind of an employee as to the union's status as his bargaining representative." *Id.* at 1061-1062. Employer-initiated polls, even if conducted with procedural safeguards, have a potential for friction and disruption that the Board was entitled to consider in fashioning its rule.

The Board also properly concluded that a lower standard for polling is not necessary to protect legitimate employer or employee interests. It explained that the rebuttable presumption of continued majority status enjoyed by an incumbent union "effectively insulates an employer against an allegation that it is unlawfully recognizing a minority incumbent union, and it also effectively relieves an employer of any obligation it might feel to withdraw recognition from an incumbent union whose majority support is doubted by the employer." *Texas Petrochemicals*, 296 N.L.R.B. at 1062. Thus, there is, as a general matter, "no compelling need" for an employer to conduct polls. *Ibid.* And the Board emphasized that its polling standard does not abridge the right of employees to choose for themselves whether or not to be represented for purposes of collective bargaining. It pointed out that employees always have the "means to rid themselves of an incumbent representative that is no longer supported by the majority (*i.e.*, a decertification election upon a petition * * * supported by at least 30 percent of the unit employees)." *Id.* at 1062.

b. Petitioner contends (Pet. 7-8) that a higher standard should apply to withdrawals of recognition than to RM petitions and employer polls, and that it is therefore irrational for the Board to apply the same standard to each. Petitioner suggests (Pet. 10) that the Board makes it impossible to use polling exactly when such polling would be useful to an employer, *viz.*, when there is substantial doubt, but not necessarily conclusive proof, of the union's loss of majority support.

As the Board has pointed out, however, an employer could well find polling useful even when it possessed a

good-faith reasonable doubt about the union's majority support, and could therefore theoretically proceed to withdraw recognition of the union without a poll. The poll allows the employer "to obtain more certain, precise information about the union's support than is provided by its own reasonable doubt." *Texas Petrochemicals*, 296 N.L.R.B. at 1063. The results of a poll, if favorable to the employer, would more definitively resolve the question of the union's continued majority status, and would therefore enable the employer to "act with confidence and certainty in light of the results of the poll." *Ibid.*[2]

Nor is there merit to petitioner's further contention (Pet. 8-9) that the statutory goal of "promot[ing] industrial and workplace stability in collective-bargaining relationships" (*Texas Petrochemicals*, 296 N.L.R.B. at 1061) is inapplicable where, as here, the employer seeking to conduct the poll is a successor with no established bargaining relationship with the employees' representative. In a successorship situation, there is an "unsettling transition period" between predecessor and successor employers, during which time "the union needs the presumptions of majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor." *Fall River Dyeing*, 482 U.S. at 39. Accordingly, in that situation, no less than in a non-successorship case, the Board acts consistently with the statute's goal of promoting stability in bargaining relationships by applying the same standard for

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[2] Indeed, in this case, petitioner informed the Union that it was conducting the poll "[i]n order to avoid possible protracted and unproductive dispute over [the] issue" of the Union's continued support. Pet. App. 43.

polling, by means of which the employer seeks to rebut the union's presumption of majority status and thus to terminate the bargaining relationship.[3]

2. Petitioner correctly points out (Pet. 10-15) that three other courts of appeals have rejected the Board's polling standard. See *Mingtree Restaurant, Inc.* v. *NLRB*, 736 F.2d 1295 (9th Cir. 1984); *Thomas Indus., Inc.* v. *NLRB*, 687 F.2d 863 (6th Cir. 1982); *NLRB* v. *A.W. Thompson, Inc.*, 651 F.2d 1141 (5th Cir. 1981). Despite the conflict in the circuits, further review of the issue is not warranted in this case, for petitioner's poll was unlawful even under the less stringent polling standard adopted by the courts that have rejected the Board's rule.

a. In *A.W. Thompson*, the Fifth Circuit held (insofar as relevant here) that "when an employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere, it may * * * poll the employees for their union sentiment if there is other substantial, objective evidence of a loss of union support (even if that evidence is not sufficient by itself to justify withdrawal [of recognition])." 651 F.2d at 1145 (internal quotation marks and footnote

[3] Petitioner errs in suggesting (Pet. 8 n.6) that the Board's judgment that RM elections and employer polls should be governed by the same standard is not entitled to deference because "the standard for RM elections is immune from judicial review." That standard, like any other Board rule, is subject to review by the courts for rationality and consistency with the Act. Petitioner's reliance on *AFL* v. *NLRB*, 308 U.S. 401 (1940), is misplaced. There, the Court held only that a decision by the Board to certify a union in a representation proceeding pursuant to Section 9 of the Act, 29 U.S.C. 159, is not a "final order of the Board" in an unfair labor practice proceeding for purposes of immediate review by the court of appeals under Section 10(f), 29 U.S.C. 160(f). 308 U.S. at 404-412.

omitted). The court ruled in that case that the employer's poll was unlawful because it had engaged in repeated unfair labor practices, and that, in any event, the employer's evidence as to the union's alleged loss of support was not probative of employee sentiment. *Ibid.* In *Thomas Industries*, the Sixth Circuit, following *A.W. Thompson*, held that "an employer may poll its employees to determine their union sentiment if it has substantial, objective evidence of a loss of union support, even if that evidence is insufficient in itself to justify withdrawal." 687 F.2d at 867. The court concluded in that case that the employer's poll was lawful, citing as "the key factor" evidence that, in the ten-month period preceding the poll, the number of employees who authorized the employer to deduct union dues from their paychecks had declined from 63% to 31% of the bargaining unit. *Id.* at 868. Finally, in *Mingtree Restaurant*, the Ninth Circuit also adopted the "substantial loss of support" standard for polling. 736 F.2d at 1299. The court remanded the case to the Board for a determination of whether the poll was lawful under the court's test. *Ibid.*

b. Petitioner's poll was unlawful even under the polling standard adopted by the Fifth, Sixth, and Ninth Circuits. The court below found, in agreement with the Board, that, prior to conducting the poll, petitioner had reason to believe that, at most, 20% of the employees in the bargaining unit no longer wished to be represented by the Union. Pet. App. 9-12. As the Board concluded (*id.* at 26 n.9), none of the courts that have rejected the Board's polling standard would have found such a meager evidentiary showing to constitute a "substantial loss" of support by the

Union justifying a poll.[4] See also *Wagon Wheel Bowl, Inc.* v. *NLRB*, 47 F.3d 332 (9th Cir. 1995) (upholding Board's conclusion that employer poll was unlawful under more lenient standard, since employees had made only "general statements" of dissatisfaction with their union). Because application of the more lenient "substantial loss" of support polling standard would not affect the outcome, this case is not an appropriate vehicle for the Court to decide whether the Board's polling standard represents a reasonable construction of the Act.[5]

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[4] Although petitioner suggests that it had a reasonable basis for believing, prior to conducting the poll, that more than seven of the 32 employees in the bargaining unit no longer desired Union representation (*e.g.*, Pet. 3), the Board's contrary factual finding, which was sustained by the court as supported by substantial evidence, raises no issue warranting further review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). Petitioner also suggests (Pet. 13) that, even if its poll was unlawful, the Board, as a remedy, should have ordered an election, rather than issuing a bargaining order. As the court of appeals concluded, however, petitioner is jurisdictionally barred by Section 10(e) of the Act, 29 U.S.C. 160(e), from challenging the Board's remedy in the courts, because petitioner failed to raise its objection before the Board. Pet. App. 12-13. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982). In any event, petitioner's claim is without merit, for "an affirmative bargaining order is the standard Board remedy" where, as here, the employer has unlawfully refused to recognize and bargain with the union. Pet. App. 27 n.12; see *Williams Enterprises, Inc.*, 312 N.L.R.B. 937 (1993), enforced, 50 F.3d 1280 (4th Cir. 1995); *Caterair International*, 322 N.L.R.B. No. 11 (Aug. 27, 1996).

[5] Petitioner notes (Pet. 14-15) that two Justices have expressed doubt about the Board's standard for polling. See *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 797 (1990) (Rehnquist, C.J., concurring); *id.* at 799-800 & n.3 (Blackmun, J., dissenting). The issue before the Court in *Curtin Matheson* was not polling, but rather, whether striker replacements should be presumed to oppose the incumbent union, thus justifying the employer's withdrawal of recognition. Because polling was not involved in *Curtin Matheson*, the Board's brief to the Court did not address the validity of the Board's polling standard.

3. The issue presented by the petition may soon lack continuing significance. In a case now pending before the Board, the General Counsel of the Board has argued that the Board should abandon its current "reasonable doubt" standard as it relates to withdrawals of recognition from certified unions, and should adopt new rules governing withdrawals of recognition from, and polling of employees represented by, such unions. Specifically, the General Counsel has urged the Board to adopt a rule that an employer may not withdraw recognition from a certified union unless a majority of the employees reject union representation in a secret ballot election, to be conducted upon a 30% showing of interest, and that an employer's good-faith doubt about loss of majority status, unconfirmed by election results, is insufficient to justify withdrawal of recognition from a certified union. The General Counsel has also asked the Board to rule that an employer would be permitted to conduct a poll, for the purpose of establishing a basis for securing a secret ballot election, if the employer had objective reason to believe that at least 30% of the employees in the bargaining unit no longer desired union representation. See General Counsel's Exceptions and Brief at 8-13, *Chelsea Industries, Inc.*,

No. 7-CA-36846 *et al.*[6] Because the General Counsel's submission in *Chelsea Industries*, if accepted by the Board, could render the issue in this case academic, further review of the issue in this case is not warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

JANUARY 1997

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[6] We have provided petitioner with a copy of the General Counsel's brief in *Chelsea Industries* and have also lodged a copy of that brief with the Clerk of this Court.